

**Laborers' District Council of Western Pennsylvania,
a/w Laborers' International Union of North
America, AFL-CIO and Paschen Contractors/-
Dick Enterprises¹ and Pile Drivers Local Union
No. 2264 of the Carpenters District Council of
Western Pennsylvania, United Brotherhood of
Carpenters and Joiners of America, AFL-CIO.
Case 6-CD-788**

30 April 1984

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND DENNIS

The charge in this Section 10(k) proceeding was filed 27 October 1983 by the Employer, alleging that the Respondent, Laborers, violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by the Pile Drivers. The hearing was held 14 November 1983 before Hearing Officer Thomas R. Davies.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

Paschen Contractors, an Illinois corporation, and Dick Enterprises, a Pennsylvania corporation, are engaged as a joint venture in the construction of the Mt. Lebanon Tunnel subway project under a contract with the Port Authority of Allegheny County (the Port Authority). During the 12 months preceding the date of the hearing, this joint venture purchased and received goods and materials valued in excess of \$50,000 directly from outside the Commonwealth of Pennsylvania. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Laborers and the Pile Drivers are labor organizations within the meaning of Section 2(5) of the Act.

¹ The notice of hearing and the hearing officer's report mistakenly refer to the Employer as Paschen Contractors/Dick Enterprises.

II. THE DISPUTE

A. Background and Facts of Dispute

In 1981 the Port Authority awarded the Employer the contract to construct the Mt. Lebanon Tunnel, which will become part of an integrated subway system connecting the city of Pittsburgh and the surrounding areas. The Employer's workers utilize the "cut and cover" method to excavate the large entrances at each end of the tunnel and to provide space for the necessary ventilation equipment. The method entails installing wooden slats known as lagging behind vertical piles implanted in the ground to prevent the earth from caving in.

Prior to commencing construction, the Employer conferred with Laborers' and Pile Drivers' representatives. The Laborers and Pile Drivers each claimed the lagging work on the project, but the Employer did not assign that work at the meeting. In early October 1983 a Pile Drivers' representative informed the Employer's project manager that the Pile Drivers would take whatever action was necessary to ensure that the Employer assigned the lagging work to employees represented by the Pile Drivers. On 19 October 1983 the Employer assigned the lagging work to employees represented by the Laborers. On 24 October 1983 the Employer advised the Laborers that it might reassign the lagging work to employees represented by the Pile Drivers. On 25 October 1983 the Laborers' president notified the Employer that if the Employer re-assigned the lagging work the Laborers would "take the necessary action which shall include but not be limited to picketing" the project to retain that work.

Employees represented by the Laborers continued to perform lagging work. Lagging work has been completed at the south end of the tunnel. Considerable lagging work remains at the north end of the project.

B. Work in Dispute

The disputed work consists of the loading, hooking-on, signaling, handling, and installing of lagging at the Mt. Lebanon Tunnel project in Mt. Lebanon, Pennsylvania.

C. Contentions of the Parties

The Employer and the Laborers contend that the work in dispute should be awarded to employees represented by the Laborers based on considerations of employer preference and past practice; industry and area practice; and provisions of the applicable collective-bargaining contracts. The Employer further contends that such an assignment will result in greater economy, efficiency, and

safety of operations. The Laborers urges that the Board enter a broad order awarding the type of lagging work in dispute to employees it represents wherever its and the Pile Drivers' geographical jurisdictions coincide.

At the hearing the Pile Drivers' counsel moved to quash the notice of hearing on the grounds that the Pile Drivers had disclaimed the disputed work. After making that motion, the Pile Drivers' counsel left the hearing room and did not return. The Pile Drivers did not file a posthearing brief.

D. Applicability of the Statute

As set forth above, it is uncontroverted that the Laborers demanded the disputed work and threatened to picket the project in support of its demand if the Employer reassigned the work to employees represented by the Pile Drivers. Based on the foregoing and on the record as a whole, we find reasonable cause to believe that an object of the Laborers' action was to force or require the Employer to continue to assign the disputed work to employees it represents.

The Employer and the Laborers agree that there is no agreed method for the voluntary adjustment of this dispute to which all the parties are bound. The record discloses no evidence to the contrary.

The Pile Drivers contends, however, that this proceeding should be dismissed because it effectively disclaimed the disputed work.² The Pile Drivers' counsel initially represented that the Pile Drivers disclaimed any interest in performing the disputed work at the Mt. Lebanon Tunnel project. Subsequently, the Pile Drivers' counsel limited the disclaimer to the lagging work at the south end of the tunnel and expressly reserved the Pile Drivers' right to claim the identical lagging work at the tunnel's north end.

The 10(k) notice of hearing described the work in dispute as the lagging work "at the Mt. Lebanon Tunnel Project." The construction of the north end of the tunnel, including the necessary lagging work, is part of that project. The Employer and Laborers agree that the Employer's original award of the lagging work to the Laborers covered the entire project. At the prejob conference the Pile Drivers demanded the disputed work for the entire project.

The Mt. Lebanon Tunnel project encompasses the lagging work at both the north and south ends of the tunnel. Therefore, we find that the Pile Drivers' renouncing lagging work for only a por-

tion of the project is an attempt to avoid an authoritative decision on the merits, *Electrical Workers IBEW Local 701 (Argonne National Laboratory)*, 255 NLRB 1157, 1160 (1981), and does not constitute an effective disclaimer of interest in the work. *Operating Engineers Local 825 (Cruz Contractors)*, 239 NLRB 490, 490-492 (1978).³ Such an empty disclaimer cannot be given effect and, consequently, the Pile Drivers' motion to quash the notice of hearing is denied.

We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreements

No party claims that either Union is certified as the collective-bargaining representative of a unit of the Employer's employees. Accordingly, this factor is not helpful in resolving this dispute.

The Employer is a member of the Constructors Association of Western Pennsylvania, which has collective-bargaining agreements with the Laborers and the Pile Drivers. The Pile Drivers' contract specifies that employees represented by the Pile Drivers will perform lagging work "used in and for foundations." Expert testimony indicated, however, that subway tunnels and entrances do not have foundations within the accepted meaning of that word in the construction industry. We find the Pile Drivers' contractual claim without merit. The Laborers' contract does not expressly refer to the assignment of lagging work. However, the classifi-

² The Board has held that an effective renunciation of the work in dispute dissolves the jurisdictional dispute. See *Sheet Metal Workers Local 55 (Gilbert L. Phillips)*, 213 NLRB 479, 480-481 (1974); *Laborers Local 935 (C & S Construction Co.)*, 206 NLRB 807, 808 (1973).

³ Thus, *Laborers Local 66 (Georgia-Pacific Corp.)*, 209 NLRB 611 (1974), is inapposite. In *Georgia-Pacific*, the Union's disclaimer of interest extended to all the work at issue in the 10(k) proceeding. In these circumstances, Chairman Doston finds it unnecessary to pass on the continuing validity of *Georgia-Pacific*.

cation of labor set forth in the addendum to that contract does include a reference to "sheeters and shorers," and the record discloses that sheeting and shoring is synonymous with lagging. We find the Laborers' contract is sufficiently broad to include the work in dispute and, to that limited extent, the contract favors assignment of the lagging work to employees represented by the Laborers.⁴

2. Employer's past practice and preference

The Employer presented evidence that it had utilized employees represented by the Laborers to handle and install lagging on previous jobs, at least two of which were tunnel projects. We find that these factors favor awarding the disputed work to employees represented by the Laborers.

3. Area and industry practice

The Employer and the Laborers maintained that in the construction industry lagging work in connection with a cut and cover excavation is normally performed by employees represented by the Laborers. At the hearing the Laborers introduced two prior Board decisions⁵ and a decision of the National Joint Board and Impartial Jurisdictional Disputes Board where the employers and the National Joint Board awarded lagging work in the construction of several subways to the Laborers. We find that the predominant industry practice favors an award of the disputed work to employees represented by the Laborers.

The Mt. Lebanon Tunnel is the second subway project in the Pittsburgh area. In an almost identical work dispute between these Unions during the construction of the first portion of the Pittsburgh subway, the employer assigned the lagging work to employees represented by the Laborers.⁶ We find that area practice, at least to a limited extent, favors the assignment of the disputed work to employees represented by the Laborers.

4. Relative skills and safety considerations

The Employer concedes that the employees represented by the Laborers and the Pile Drivers possess the requisite skill to perform the disputed work. We therefore find that this factor does not favor awarding the disputed work to either group of employees.

The Employer's witness testified that an award of the disputed work to employees represented by the Pile Drivers would result in more employees in a confined area near heavy equipment and possibly

unstable embankments and thus increase the likelihood of injuries. Accordingly, we find that safety considerations favor an award of the disputed work to employees represented by the Laborers.

5. Economy and efficiency of operations

The construction-site employees unload the lagging, cut the lagging to size, trim the face of the excavation, install and backfill behind the lagging, and, finally, remove the lagging. At the time of the hearing laborers did all lagging work and performed other jobs on the construction site. According to unrefuted testimony, the Pile Drivers sought only to install and remove the lagging. Thus, if employees represented by the Pile Drivers were to perform the work they claim, the Employer would still need the present complement of laborers to perform the other lagging work. Consequently, an award of the work to employees represented by the Pile Drivers would result in two different crews performing related work, thereby leaving employees standing idle during the successive stages of the lagging process. Further, the nature of the disputed work is unskilled and, while laborers are so classified, pile drivers are classified as skilled workers. Therefore, if the Board awarded the disputed work to employees represented by the Pile Drivers, the Employer would have to employ more workers and use skilled employees to perform unskilled lagging work. Accordingly, we find that the factors of economy and efficiency of operations favor an award of the disputed work to employees represented by the Laborers.

Conclusion

After considering all the relevant factors, we conclude that employees represented by the Laborers are entitled to perform the work in dispute. We reach this conclusion primarily relying on the Employer's past practice and preference, the fact that such an assignment is consistent with the predominant industry and area practice, and the fact that such an assignment results in greater efficiency, economy, and safety of operations. In making this determination, we are awarding the work to employees represented by the Laborers, not to that Union or its members.

Scope of the Award

The Laborers requests that the Board issue a broad award assigning the disputed work to employees it represents on all jobsites where the territorial jurisdictions of the Pile Drivers and the Laborers coincide, contending that such an order is necessary to avoid a repetition of similar jurisdic-

⁴ See also *Laborers (Anjo Construction Co.)*, 265 NLRB 186 (1982).

⁵ *Anjo Construction Co.*, 265 NLRB 186 (1982); *Laborers (Fruin-Colnon Corp.)*, 241 NLRB 126 (1979).

⁶ *Anjo Construction Co.*, 265 NLRB 186 (1982).

tional work disputes and the ensuing unlawful attempts to coerce the assignment of that work.

Normally, 10(k) awards are limited to the jobsite or sites where the unlawful 8(b)(4)(D) conduct occurred or was threatened. There are two prerequisites for a broad areawide award: (1) there must be evidence that the work in dispute has been a continuous source of controversy in the relevant geographical area and that similar disputes may recur; and (2) there must be evidence demonstrating the offending union's proclivity to engage in further unlawful conduct in order to obtain work similar to that in dispute. *Electrical Workers IBEW Local 104 (Standard Sign & Signal Co.)*, 248 NLRB 1144, 1148 (1980).

The records shows a single prior dispute between the Laborers and the Pile Drivers over the work in dispute. Further, it was the Laborers' conduct, not the Pile Drivers' actions, that resulted in the filing of the unfair labor practice charge and the institution of this 10(k) proceeding. See *Standard Sign & Signal Co.*, 248 NLRB at 1148. Finally,

while the Pile Drivers has expressed an interest in similar work that becomes available in the future, there is no evidence that the Pile Drivers will likely resort to unlawful means to claim that work. See *Ironworkers Local 3 (Spancrete Northeast)*, 243 NLRB 467, 470 (1979). Under these circumstances, we find that a broad order is not warranted. Accordingly, the determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Paschen Contractors/Dick Enterprises represented by Laborers' District Council of Western Pennsylvania, a/w Laborers' International Union of North America, AFL-CIO, are entitled to perform the loading, hooking-on, signaling, handling, and installing of lagging at the Mt. Lebanon Tunnel jobsite located in the Allegheny County, Pennsylvania.